# Law Enforcement Digest

June 1999


## HONOR ROLL

**103rd Session, Spokane Police Academy - 499th Session, Basic Law Enforcement Academy**
**January 21st through April 13th, 1999**

| | |
|---|---|
| Highest Achievement in Scholarship: | Joseph M. Spink - Spokane County Sheriff's Office |
| Highest Achievement in Night Mock Scenes: | Aaron S. Breshears - Pullman Police Department |
| Outstanding Officer: | Joel D. Fielder - Spokane Fire Department |
| Highest Achievement in Pistol Marksmanship: | Aaron S. Breshears - Pullman Police Department |
| Best Overall Firearms: | Lee G. Bennett - Newport Police Department |
| Best Tactical Firearms: | Lee G. Bennett - Newport Police Department |

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**490th Session, Basic Law Enforcement Academy - January 20th through April 14th, 1999**

| | |
|---|---|
| President: | Jonathon Huber - Seattle Police Department |
| Best Overall: | Edwin Anderson - Vader Police Department |
| Best Academic: | William Hurley - King County Sheriff's Office |
| Best Firearms: | David Mann - King County Sheriff's Office |
| Tac Officer: | Henry Gill - Tacoma Police Department |

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**Corrections Officer Academy - Class 283 - January 6th through February 5th, 1999**

Highest Overall: Tommie Nicodemus - Pierce County Jail

**Corrections Officer Academy - Class 284 - January 6th through February 5th, 1999**

Highest Overall: Scott Attaway - Airway Heights Corrections Center

**Corrections Officer Academy - Class 285 - January 15h through February 12th, 1999**

Highest Overall: Timothy Paget - King County Department of Adult Detention

**Corrections Officer Academy - Class 286 - February 10th through March 10th, 1999**

| | |
|---|---|
| Highest Overall: | Shayne Poole - Kittitas County Sheriff's Office |
| Highest Academic: | Joseph Hoffard - King County Department of Adult Detention |
| Highest Practical Test: | Nicole Anderson - Clark County Sheriff's Office |
| Highest in Mock Scenes: | Shayne Poole - Kittitas County Sheriff's Office |
| Highest Defensive Tactics: | Chris Butler - Yakima County Corrections |

**Corrections Officer Academy - Class 287 - February 10th through March 10th, 1999**

| | |
|---|---|
| Highest Overall: | Kevin Arnold - Okanogan County Corrections Center |
| Highest Academic: | Nicole Davis - Chelan City Jail |
| Highest Practical Test: | Scott Perry - Pierce County Sheriff's Office/Jail |
| Highest in Mock Scenes: | Travis Anderson - Whitman County Jail |
| Highest Defensive Tactics: | Joe Jackson - Benton County Corrections |

**Corrections Officer Academy - Class 288 - March 15th through April 9th, 1999**

| | |
|---|---|
| Highest Overall: | Enoch Varner - King County Department of Adult Detention |
| Highest Academic: | Laura Miller - Bonney Lake Police Department |
| Highest Practical Test: | Enoch Varner - King County Department of Adult Detention |
| Highest in Mock Scenes: | Enoch Varner - King County Department of Adult Detention |
| Highest Defensive Tactics: | Todd Furdyk - Whatcom County Jail |

**Corrections Officer Academy - Class 289 - March 15th through April 9th, 1999**

| | |
|---|---|
| Highest Overall: | Robert Miller - Pierce County Sheriff's Office |
| Highest Academic: | Matthew Greenland - Washington State Penitentiary |
| Highest Practical Test: | Donald Wenzl - Clallam County Sheriff's Office |
| Highest in Mock Scenes: | Vaughn Gano - Clark County Sheriff's Office |
| Highest Defensive Tactics: | Charles Skirko - Okanogan County Sheriff's Office |

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## BRIEF NOTE FROM THE NINTH CIRCUIT OF THE U.S. COURT OF APPEALS

**"VIENNA CONVENTION RIGHTS" VIOLATION MAY RESULT IN SUPPRESSION OF CONFESSION** – In U.S. v. Lombera-Camorlinga, 170 F.3d 1241 (9th Cir. 1999), the 9th Circuit of the U.S. Court of Appeals rules that a violation of the warning requirements of the Vienna Convention (see article in May 99 **LED** at 18-21) can result in suppression of a defendant's statement given after the violation.

In Lombera-Camorlinga, the defendant in a marijuana smuggling case asserted that, at the time was given Miranda warnings preparatory to a custodial interrogation, he was not given the necessary "foreign national" warnings under the Vienna Convention. The 9th Circuit holds that incriminating statements given in this circumstance must be suppressed if the defendant can demonstrate that he was prejudiced by the failure of police to comply with the Vienna Convention by telling him about this right to contact his consulate. The Lombera-Camorlinga ruling by the 9th Circuit sends the case back to the federal district court for Southern California for hearings on the prejudice issue.

Result: Reversal of federal district court conviction of importation of marijuana in violation of federal law; remand for "Vienna Convention rights" hearing.

**LED EDITOR'S NOTE: In the May 99 LED, we provided a four-page article on how the Vienna Convention applies to local and state law enforcement officers. The Lombera-Camorlinga decision illustrates that it is advisable that all law enforcement officers review that article and incorporate the law on arrest of foreign nationals into their procedures.**

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## WASHINGTON STATE COURT OF APPEALS

**WHERE ATTORNEY CONTACTED POLICE AND TRIED TO STOP CUSTODIAL INTERROGATION, POLICE WERE NOT REQUIRED TO STOP INTERROGATION NOR TO TELL SUSPECT OF COMMUNICATION; BUT COURT QUESTIONS WISDOM OF RULE**

State v. Corn, ___ Wn. App. ___ (Div. III, 1999) [1999 WL 222951]

Facts and Proceedings:

The Court of Appeals describes as follows the facts and proceedings relating to the admissibility of Michelle Corn's statement's to the police following her arrest:

> On November 21, 1995, in response to a 911 call, two Kennewick police officers entered the apartment of Michelle Corn and discovered a man lying on the floor. Ms. Corn was on her knees next to him holding a phone receiver that was covered with blood. Ms. Corn asked the officers to "please help him." The man, Darin Haney, was transported to the hospital by paramedics. He died later that evening of a single knife wound to the heart.

Ms. Corn was taken into police custody. Before she was advised of her Miranda rights and interrogated, she made statements concerning the fatal incident to the police officers that were assigned to hold, but not interrogate, her. Detective Kenneth Taylor, who was assigned to interrogate Ms. Corn, advised her of her Miranda rights at 12:01 a.m. and again at 12:52 a.m. Both times Ms. Corn waived her rights. Ms. Corn asked Detective Taylor for information concerning the condition of Mr. Haney. On both occasions, Detective Taylor informed Ms. Corn that Mr. Haney's condition was grave. At the time of the second inquiry, Detective Taylor knew Mr. Haney was dead, but decided to withhold this information from Ms. Corn.

After Ms. Corn was taken into custody, her family retained an attorney to represent her. The attorney called the police department and informed them that: 1) he had been retained by Ms. Corn's brother; 2) he wanted to talk to Ms. Corn; and 3) he wanted all interrogations to stop. In response, the attorney was told he would not be able to see his client because Ms. Corn had not requested counsel. He then called Andy Miller, the prosecuting attorney, at home and reiterated his demand to see his client. Mr. Miller advised him the police could prevent him from seeing his client unless she requested counsel.

When the attorney arrived at the police station, he was informed that Ms. Corn was at the hospital. He stated that he wanted to see her as soon as she returned to the station, and that he did not want her talking to police officers. When Ms. Corn returned from the hospital, the police did not inform her of the presence of the attorney. The police did not tell the attorney that Ms. Corn was at the station until the interrogation had been completed. The police also delayed informing Ms. Corn of Mr. Haney's death until after the interrogation was completed and her written statement was signed.

Ms. Corn was initially charged with manslaughter in the second degree, but later the charge was amended to manslaughter in the first degree. Prior to trial, the court concluded that Ms. Corn's statements to the police officers, including the written statement, were admissible for purposes of CrR 3.5. The court concluded that Ms. Corn knowingly, voluntarily and intelligently waved her rights. The court also concluded these statements were voluntarily made and the police had no duty to inform Ms. Corn of the attorney's attempts to contact her because Ms. Corn's brother, and not Ms. Corn, had retained the attorney. The court also concluded that while Ms. Corn had been misled during the interview about Mr. Haney's condition, she was aware that he was in "grave condition" and that she faced "potential serious legal consequences."

At trial defendant Corn argued self defense. She was convicted in a jury trial of manslaughter in the first degree, but, based on a defect in the jury instruction on self defense, the trial court granted her motion for a mistrial and granted her a new trial.

ISSUE AND RULING: Did the police violate defendant Corn's rights by: a) not telling Ms. Corn that an attorney was trying to contact her, and/or b) not stopping the interrogation at the attorney's request? (ANSWER: No) Result: Affirmance of Benton County Superior Court order for new trial of Michelle Corn (based on ruling on a self defense jury instruction issue not addressed in this **LED** entry).

ANALYSIS:

1. Introduction

Based on a 1986 U.S. Supreme Court decision and a 1991 Washington Supreme Court decision applying the 1986 U.S. Supreme Court precedent, the Corn Court holds that the police were neither: a) required to tell Ms. Corn that an attorney retained by her family was trying to contact her, nor b) required to stop the interrogation at the attorney's request. However, the Corn Court does place in question the breadth of the rule under those precedents. The Corn Court questions the wisdom of the rule under the precedents, which rule appears to be to the effect that a custodial suspect who has not asserted the right to counsel need not to be told of an attorney's efforts to contact him or her.

2. 1986 U.S. Supreme Court decision in Moran v. Burbine

In Moran v. Burbine, 475 U.S. 412 (1986) **May 86 LED:01**, the U.S. Supreme Court addressed a similar situation. In Moran v. Burbine, Brian Burbine's sister found out her brother had been arrested for burglary. On her own, without any communication with her brother, she contacted a public defender's office, which in turn contacted the police department by phone. The public defender's office left word with the police that the defender's office represented Burbine and did not want Burbine questioned on the burglary without the presence of counsel. The police employee answering this 8:15 p.m. phone call told the defender's office that Burbine would not be questioned that night. In fact, at that point, officers from a nearby department investigating a murder were just about to question Burbine on the murder. At 9:00 p.m. that night Burbine waived his rights and confessed to the murder. Only later did Burbine learn of the public defender's efforts to contact him and to stop questioning.

The U.S. Supreme Court held in a 6-3 ruling in Burbine that the Fifth Amendment of the U.S. Constitution does not require that police inform a custodial suspect of an attorney's efforts to contact him under these circumstances. The voluntariness of a custodial suspect's waiver of Miranda rights focuses: a) on police conduct which is known to the suspect, and b) on the suspect's capacity to comprehend and knowingly give up rights. Voluntariness of a Miranda waiver does not depend on events occurring outside of the suspect's presence and entirely unknown to him or her, the Burbine Court held in a broad ruling.

The Burbine Court also rejected defendant's arguments that the police conduct violated the Sixth Amendment right to counsel or the Fourteenth Amendment right to due process. On the Sixth Amendment issue, the Court held, as it has always held, that Sixth Amendment protections are not triggered until after formal charges have been filed. And on the "due process" question, the Burbine Court conceded that egregious police conduct in this context which "shocks the conscience" might trigger a due process suppression remedy, but the deception by the police in Burbine fell well short of that standard.

3. 1991 Washington State Supreme Court decision in State v. Earls

In State v. Earls, 116 Wn.2d 364 (1991) **May 91 LED:02**, the Washington State Supreme Court held in an 8-1 ruling that the Washington constitutional counterpart to the Fifth Amendment – article 1, section 9 – provided no greater protection. The Earls Court therefore held under circumstances similar to those in Burbine that police had no obligation to tell a custodial suspect of an attorney's efforts to contact the suspect.

In Earls, the defendant had been lawfully arrested as a murder suspect. At the booking area, prior to any police effort to interrogate him, Earls telephoned his ex-wife and asked her to get him

an attorney. The arresting detective apparently assisted defendant in placing the call. The ex-wife was able to talk to an attorney later that day, and the attorney promised to call the police. The attorney had not been retained as counsel. The attorney called the police department. Apparently, at that point, Earls had waived his Miranda rights and was in the process of being interrogated by the investigators, or he was about to be interrogated.

It is unclear what the attorney said or was told in this telephone contact to the police station, but it is clear that defendant was not told of the attorney's phone call before he completed his confession. Defendant ultimately confessed to the murder after being offered a deal in which he would not be charged with aggravated first degree murder.

The majority opinion of the State Supreme Court first clarified that, because no formal charges had been filed against Earls at the time of his confession, his Sixth Amendment right to counsel did not apply in this case. The majority then engaged in "independent grounds" analysis which ultimately concluded that the Fifth Amendment of the U.S. Constitution and its counterpart in the Washington Constitution, – article 1, section 9 – have the same meaning. Finally, the majority resolved the issue under these equivalent state and federal constitutional provisions by relying on the U.S. Supreme Court's ruling in Burbine.

4. Defendant Corn's efforts to distinguish Burbine and Earls

Defendant Corn first tried to distinguish her case factually from that in Earls by pointing out that the attorney in Earls had not yet been retained at the point when he contacted the police, whereas Corn's attorney had already been retained at the point of contact. The Corn Court explains that this factual difference does not make a difference under Burbine and Earls, because retention of an attorney by others is an event occurring outside the presence and knowledge of the custodial suspect. Hence, it cannot affect the validity of the waiver.

Corn then argued that the Court of Appeals could rule in her favor on one of two theories not addressed by the Supreme Court in Earls: 1) that the "due process" protections of the Washington constitution are greater than those of the federal constitution; and 2) that Washington Criminal Rule 3.1 provides greater protection than the Fifth or Sixth Amendments or their state counterparts.

The Corn Court rejects her arguments under the following analysis:

> It is well established that the Sixth and Fourteenth Amendment right to counsel attaches at the initiation of adversarial criminal proceedings. The right to counsel under article I, section 22 (amendment 10) of the Washington Constitution does not provide more protection than the Sixth Amendment. Moreover, the protections of CrR 3.1(c)(2) are activated only after the accused requests an attorney. It follows then that CrR 3.1(b)(1) does not grant additional rights, but rather reinforces the Miranda right to counsel. Contrary to the assertions of Ms. Corn, the language of CrR 3.1(b)(1) does not trigger the right to counsel at the earliest possible moment.
>
> Ms. Corn's second argument is based on a due process analysis. In effect, she invokes the Washington counterpart of the due process clause, and asks this court to circumvent Burbine and Earls on this basis rather than the Fifth Amendment analysis employed by those courts. Conducting a Gunwall analysis, Ms. Corn asserts the due process clause of the Washington State Constitution grants greater rights than its federal counterpart and prohibits the police conduct here.

Ms. Corn contends the police conduct here is different from that in either Earls or Burbine because the police: 1) shuffled Ms. Corn through back doors and used routes that would prevent her from seeing her attorney; 2) misled her attorney as to her whereabouts; and 3) held her in isolation. In short, Ms. Corn concludes the police conduct here constitutes police "misconduct," and asks that we evaluate this conduct under a new due process standard derived from state law. To support this argument, Ms. Corn cites cases where state courts have rejected Burbine based on due process provisions in state constitutions. See, e.g. State v. Stoddard, 206 Conn. 157, 537 A.2d 446 (1988); Haliburton v. State, 415 So.2d 1088 (Fla. 1987).

Earls sets forth the analytical framework applicable here. We decline Ms. Corn's invitation to reject Burbine under a due process analysis when the Earls court has already approved similar conduct under its examination of the right against self-incrimination as set forth in the Fifth Amendment and article I, section 9. The facts in the record before us are insufficient to trigger a separate analysis under either the state or the federal due process clause. Conducting our analysis under Earls, we conclude Ms. Corn freely, knowingly and intelligently chose to give up her right to have the assistance of counsel. Under the circumstances here, nothing that occurred inside or outside of the interrogation room changed the fact that Ms. Corn knew she had the right to an attorney and that, had she requested one, all questioning would have ceased.

**LED EDITOR'S NOTE: In a footnote, the Corn Court quotes the pertinent text from CrR 3.1:**

**CrR 3.1(b)(1) reads:**

> **"The right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest."**

**CrR 3.1 (c)(2) reads:**

> **"At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer. "**

**LED EDITOR'S COMMENTS:**

**1. Beware of State v. Greer.**

**We agree with Division Three's analysis in Corn, but we make one cautionary note. Where police know that a custodial suspect has himself or herself been trying to get in touch with an attorney after being taken into custody, it is our suggestion that police tell the suspect about any attempts by counsel to contact the suspect. While the facts in the Earls case appear to support an argument that conveying such information is not necessary, the Court of Appeals ruling in State v. Greer, 62 Wn. App. 779 (Div. I, 1991) Feb 92 LED:05 may support the contrary argument.**

**In Greer, an arrestee named Barrie was booked into jail following his arrest in the early morning hours. No attempt was made by police to question Barrie at or prior to booking. The next morning, when Barrie was screened for indigency by staff from the public**

**defender's office, he stated he wanted appointed counsel. A little while later, the lead detective on the case, fearing that Barrie might talk to his cohorts, told a corrections officer on jail staff not to let anyone talk to Barrie and not to let Barrie have access to the phone. At that time, the corrections officer told the detective that Barrie had earlier been interviewed by the office of the public defender.**

**Around noon that day, an intern from the public defender's office showed up at the jail to conduct an interview with the prisoner. The corrections officer told the intern that the intern was not allowed to see the prisoner, in part because it was lunch time (which created staffing limitations), and in part because of the request for "no contact" which had been made by the detective.**

**After the intern had left, the corrections officer called the detective and told him about the intern's attempt to see Barrie. A short time later, that detective and another detective arrived at the jail to interrogate Barrie. Barrie waived his Miranda rights and began to give a statement. About ten minutes after the interrogation began, an attorney from the public defender's office came to the jail with the intern.**

**The jail supervisor told the attorney that it was jail policy not to interrupt an ongoing interrogation. At the attorney's insistence, the supervisor did go to the interrogation room to advise the detectives of the attorney's insistence on seeing the client, but the detectives told the jail supervisor that the prosecutor's office had advised that they could first complete the questioning.**

**The attorney left and, a short while later, returned with a court order to allow the attorney immediate access to Barrie. After the attorney and Barrie conferred briefly, the attorney advised the detectives that Barrie did not wish to talk to them any further.**

**The Court of Appeals in Greer held that, while there was no constitutional violation in these circumstances under the Burbine and Earls decisions, the government's conduct violated CrR 3.1. The Greer Court explained:**

> **In the instant case, the uncontroverted facts demonstrate that the jail personnel and the detectives conspired to keep Barrie and counsel apart. When apprised that the intern had asked to see Barrie, the detectives not only hurried down to the jail to begin their interrogation, they also refused counsel's request to see Barrie or [sic] her request that he be advised that she was there. Thus, the actions of the jail personnel and the detectives deliberately thwarted the purpose of CrR 3.1, which is to provide a suspect with access to an attorney at the earliest opportunity.**
>
> **Nonetheless, as analyzed above, any actual error in the admission of Barrie's postarrest statement that he "looked mean" was immaterial to the outcome of the case, and thus harmless. However, because this error will usually not be "harmless", we emphasize that when a defendant has expressed a desire for counsel, the deliberate interference with counsel's efforts to communicate with the defendant is violative of CrR 3.1**

**[Footnotes and citations omitted]**

**The 1991 Greer decision of Division One of the Court of Appeals can be given interpretations of varying breadth in light of its relatively complex facts. The CrR 3.1 interpretation by Division One in Greer has not been the subject of any subsequent reported appellate decisions. Our moderately conservative view based on Greer's interpretation of CrR 3.1 (despite facts in Earls which suggest we are being too conservative) is that if officers learn that, following arrest, a prisoner himself or herself has made an attempt to contact counsel (including asking a public defender screener for counsel) and has remained in continuous custody after that point, but has not yet asserted his or her Miranda rights, the police should tell the prisoner when that the attorney is trying to communicate with the prisoner. We think officers can then ask the prisoner if he or she wishes to talk to the lawyer. If the prisoner says no and waives (or has already waived) Miranda rights, then interrogation can proceed.**

**2. Beware of the possibility of bad facts making bad law.**

**It is sometimes said that bad facts can result in bad law. The Corn Court criticizes the broad rule under Burbine and Earls that allows police to "prevent or delay communication between a suspect and an attorney seeking to contact that suspect." The Corn Court may be sending a signal to the Washington Supreme Court when it somewhat grudgingly recognizes that it must follow the State Supreme Court's ruling in Earls, and not so subtlety points out that several other states have made "independent state constitutional grounds" rulings requiring that police tell custodial suspects of such attorney efforts at communication.**

**Washington officers should take heed the of Corn Court's criticism of the Burbine/Earls rule (though we are curious why: (a) a different panel of Division Three judges expressed no concern about the breadth of the rule when applying it just one year ago in State v. Stackhouse, 90 Wn. App. 344 (Div. III, 1998) Sept. 98 LED:20; and (b) why the Corn panel does not even cite the Stackhouse opinion). Officers would be well advised to consciously avoid creation of bad facts. In Burbine, the Rhode Island police officers involved in that case were about to question the prisoner when they lied and told the inquiring attorney that no questioning would occur that night. In other cases around the country, officers have lied to attorneys who called or showed up at the police station by telling the attorneys that the prisoner was located at another facility or was not in custody. With an eye to future cases, we recommend that officers tell such attorneys the truth as they reject attorney requests to contact their clients. Deception in this context is generally irrelevant unless it is egregious, but any deception in this context may so offend the sensibilities of some appellate courts that they will suppress the statements obtained.**

**POST-MIRANDIZING DECEPTION BY INTERROGATOR DOES NOT RENDER STATEMENT INVOLUNTARY; ALSO, RE-MIRANDIZING HELD NOT NECESSARY AFTER BRIEF DELAY**

State v. Burkins, ___ Wn. App. ___ (Div. I, 1999) [973 P.2d 15]

Facts: The Court of Appeals describes the key facts relating to the first part of the interrogation of defendant in this case as follows:

> Donna Anderson's skeletal remains were found in an embankment approximately 2 months after she disappeared. She was last seen alive on a Friday evening at the Horseshoe Lounge in Bellingham. That night, Burkins bought Anderson drinks and then left the bar for about 30 minutes. When he

returned, he and Anderson said they were going to the Royal, a nearby tavern. Anderson did not return home that evening. Two days later, Anderson's sister filed a missing persons report.

Approximately 2 weeks later, Detective Mark Stokes spoke to Burkins about the missing persons report. Burkins admitted being with Anderson at the Horseshoe and the Royal that evening, but said that Anderson left the Royal with a tall man in a dark jacket. Approximately 6 weeks later, Detective Willis Ziebell asked Burkins to come to the police station regarding a rape complaint filed against Burkins by M.L., a woman who alleged that Burkins picked her up at a bar, smoked marijuana with her, took her to a secluded location, tied her hands, pinched her nipples, sexually assaulted her, and threatened to kill her if she refused to obey his orders. [Court of Appeals Footnote: *Burkins was ultimately tried and convicted of first degree rape of M.L. See State v. Burkins, No. 36735-8-I, 1998 WL 549432 (unpublished).*] Upon his arrival, Detective Ziebell read Burkins his Miranda rights. The police said that Burkins waived his right to an attorney and never requested that the police stop questioning him. Less than 1 hour later, Burkins agreed to speak to Detective Stokes again about the Anderson missing persons report. Burkins again told police that Anderson left the tavern with another man.

Despite Burkins' story, the police believed that the M.L. rape and the Anderson missing person case might be related. Accordingly, they attempted to link the cases by using two ruses while interviewing Burkins. In the first ruse, Detective Stokes told Burkins, though it was not true, that Anderson abused drugs and was a suspect in three robberies, one using a knife and one using a gun. But Burkins did not change his story. So the detectives utilized a second ruse: they told Burkins, though it was not true, that they had samples of Anderson's hair that matched hair found in the truck that Burkins had taken without the owner's knowledge to use that evening.

Burkins put his head down, started to shake, and admitted that he and Anderson had smoked marijuana in the truck that evening. Sergeant Kelsey told Burkins that, if Anderson had tried to rob him and he had resisted, she could have died from a heart attack or an overdose. Burkins then said, "You have the body, don't you?" Although the police had not yet recovered Anderson's body, Sergeant Kelsey told Burkins that they had. Burkins then gave the detectives a second version of what happened that evening.

Burkins said he left the Horseshoe to cash a check and pick up a gun from his apartment. When he returned, he drank with Anderson. After they left the Horseshoe, they smoked marijuana and then went to the Royal. This time, he said that he and Anderson left the Royal together in the truck. Burkins said that while he was driving, Anderson made sexual advances toward him that he refused. Then she came at him with a knife in an attempt to rob him, causing him to drive into a ditch off the highway. Because she continued to attack him, he threatened to shoot her. Then he shot at her twice, hitting her once in the neck or chest. After Anderson's body rolled into an embankment, he threw her belongings near her body.

As the interrogation of Burkins continued, Burkins changed his story two more times, though Detective Stokes used no additional deception. Ultimately, Burkins confessed that Anderson had not been in possession of a knife, but he continued to insist that he shot her from 12 to 18

inches away because she attacked him.

Proceedings: (Excerpted from Court of Appeals opinion)

> The State charged Burkins with first degree murder. At trial, the State's theory was that Burkins targeted both M.L. and Anderson to sexually assault. It theorized that Burkins ordered the women to perform sexual acts and threatened to kill them if they refused to submit and that Burkins sexually assaulted both women and allowed M.L. to live because she complied, but murdered Anderson because she resisted. After a 6-day trial, a jury convicted him. Because Burkins made Anderson more vulnerable, showed no remorse for killing her, and presents a source of danger to the community, the trial court issued an exceptional sentence above the standard range.

ISSUES AND RULINGS: 1) Did the detectives' use of deception render Burkins' Mirandized statements involuntary? (ANSWER: No, because no deception was used to obtain the waiver, and the post-Miranda deception was within reasonable limits); 2) Should Burkins have been re-advised of his Miranda rights before the detectives resumed questioning him one hour after he had waived his rights? (ANSWER: No) Result: Affirmance of Whatcom County Superior Court conviction and exceptional sentence of Wayne Edward Burkins for first degree murder.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1. Voluntariness of statements in light of police deception following the Miranda waiver.

> Burkins maintains that post-Miranda statements he made to the police were not voluntary because he was in custody for more than 5 hours and because the police deceived him.
>
> A confession is coerced, i.e., not voluntary, if based on the totality of the circumstances the defendant's will was overborne. Some of the factors considered in the totality test include the defendant's physical condition, age, mental abilities, physical experience, and police conduct. For a statement to be admissible, the State must establish that the defendant was fully advised of his Miranda rights, and knowingly and intelligently waived them.
>
> The police knowingly made untrue statements to Burkins, i.e., they said that Anderson was a suspect in three robberies and that they had recovered Anderson's body. These statements prompted Burkins, initially, to tell police that Anderson had attempted to rob him and, ultimately, to lead police to her body. Though the record indicates that police told Burkins he was free to go, Burkins argues that his statements were involuntary because his "will to resist was overcome." But he does not allege that his physical condition, age, mental abilities, or physical experience affected his decision to confess.
>
> Deception alone does not make a statement inadmissible as a matter of law; rather, the inquiry is whether the deception made the waiver of constitutional rights involuntary. In such a situation, the test for voluntariness is "'whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined -- a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth.'" Courts have held confessions to be voluntary when police falsely told a suspect that his polygraph examination showed gross deceptive patterns, when police told a suspect that a co-suspect named him as the

triggerman, and when police concealed the fact that the victim had died.

The record, viewed under the totality of the circumstances, does not support Burkins' contention that his will was overborne by the police ruses such that his confession was not freely self-determined. To the contrary, the trial court's conclusion that Burkins' statements to the police were voluntary and admissible is supported by substantial evidence in the record. Thus, we will not disturb the trial court's conclusion that Burkins' statements to the police were voluntary and admissible.

[Citations omitted]

2. Second Miranda warning where waiver given one hour earlier.

During the CrR 3.5 hearing, Burkins testified that he was advised of his Miranda rights at the beginning of the interview and that he understood those rights. Yet, on appeal, he argues, pro se, that the police violated his rights by failing to advise him of his Miranda rights prior to the interrogation that occurred thereafter [approximately one hour later – **LED** Ed.] and, therefore, that his statements to the police are not admissible.

"Where a defendant has been adequately and effectively warned of his constitutional rights, it is unnecessary to give repeated recitations of such warnings prior to the taking of each separate in-custody statement." Therefore, the trial court did not err in admitting the statements Burkins made to police.

[Citations omitted]

**LED EDITOR'S NOTE: Three other issues in this case – 1) whether there was sufficient evidence to support a finding of premeditation; 2) whether the "other crimes" evidence regarding Burkins' attack on another victim was sufficiently similar to his assault on Anderson to make it admissible under Evidence Rule 404(b); and 3) whether the circumstances supported the trial court's exceptional sentence of 720 months for the first degree murder conviction – were all resolved in favor of the State.**

**LED EDITOR'S COMMENTS:**

**1. Permissible deception during questioning. Deception in obtaining a waiver will destroy the validity of the waiver. This case did not involve pre-waiver deception. The deception used by the detective in this case was employed only after a valid waiver had been obtained. The deception seemed well within the range that has been allowed under past court decisions. As a general rule, only if the deception in the post-Mirandizing setting is of a nature that it would make an innocent person confess will the technique invalidate the confession on involuntariness grounds. Beware of three things, however, in deciding how close to get to the line: (1) deception which would not, by itself, invalidate a confession may nonetheless be a factor in the determination of whether a statement was voluntary; (2) defense attorneys may seize on the deception and imply in their questions at trial that you are, in general practice, a liar; and (3) our state has a unique line of appellate court cases which suggest in an extremely vague way (though they've never so held) that deception in questioning a suspect in a non-custodial setting may be deemed to be improper if the officer has a probable cause "focus" at the time of questioning, and the suspect has not been Mirandized prior to questioning.**

**2. Repeating the warnings. It never hurts, in a legal sense, to re-Mirandize a suspect who has earlier waived his or her rights before resuming questioning. Re-Mirandizing is not required, however, in this situation so long as the subsequent interrogation is "reasonably contemporaneous" with the earlier waiver. While the courts reviewing a resumed questioning case look at several factors (e.g., amount of time which had passed, change in identity of interviewers, whether second questioning started with brief reminder of first advisement, and suspect's past involvement with law enforcement), a general rule of thumb is that further questioning will probably be considered to be "reasonably contemporaneous" if it occurs within 24 hours of the waiver, even if the further questioning involves different officers from a different agency investigating a different crime.**

**NO "REASONABLE SUSPICION" TO STOP MAN WITH A GUN TO CHECK FOR ALIEN FIREARM LICENSE; RARITY OF ALIEN GUN LICENSES AND FACT THAT SPANISH APPEARED TO BE SUSPECT'S PRIMARY LANGUAGE DID NOT JUSTIFY HIS SEIZURE**

State v. Almanza-Guzman, ___ Wn. App. ___ (Div. I, 1999) [972 P.2d 468]

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> Appellant Juan Almanza-Guzman attended a gun show in Washington. He approached a table, looking to purchase a replacement magazine for his pistol. He retrieved the pistol from under his jacket to show the gun dealers the type of weapon he had. They did not have a magazine for Guzman's pistol.
>
> The gun dealers also happened to be off-duty United States border patrol agents. They observed that Guzman's pistol had not been disabled by a procedure required at the gun show's entrance. Based on their experience as border patrol agents and on their conversation with Guzman (most of which was conducted in Spanish), [the border patrol agents] believed that 1) Guzman's primary language was Spanish, as indicated by his accent and choice of words, and therefore 2) Guzman was a Mexican national rather than a U.S. citizen. They also knew that Washington state rarely issues permits allowing aliens to carry weapons.
>
> Based on these factors, [the border patrol agents] concluded that Guzman was an alien carrying a weapon without a license. They waited until Guzman left the crowded display area, then stopped him in the parking lot as he was starting to drive away, identifying themselves as border patrol agents. They first asked Guzman whether he was a U.S. citizen or national, whereupon Guzman showed them his residential alien card. [The border patrol agents] then asked Guzman whether he had an alien firearm license, and Guzman admitted that he did not. He was subsequently arrested.
>
> The trial court denied Guzman's motion to suppress and convicted him on stipulated facts of possessing a firearm without an alien firearm license, in violation of RCW 9.41.170. He received a sentence of 60 days' confinement and was remanded to the custody of the Immigration and Naturalization Service for immediate deportation.

[Officer names deleted]

ISSUE AND RULING: Did the officers have "reasonable suspicion" to believe Almanza-Guzman was violating RCW 9.41.170 (which prohibits aliens from possessing a firearm without an alien firearm license), thus justifying their Terry stop? (ANSWER: No) Result: Reversal of Whatcom County Superior Court conviction of Juan Almanza-Guzman for violation of RCW 9.41.170; charges dismissed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> No probable cause is needed for a Terry stop, but the seizure must be reasonable. That is, the State must be able to point to "'specific and articulable facts giving rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity.'" Such facts are "'judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?'" Guzman contends that the border patrol agents did not have reasonable suspicion of criminal activity when they detained him in the parking lot. We agree.
>
> The trial court found that [the border patrol agents] concluded that Guzman was an alien based on "their experience at the southern border with Mexican nationals, the fact that Spanish was clearly the defendant's first language, the defendant's choice of words during the conversation, and his accent." However, being an alien does not, in and of itself, implicate criminal activity. Indeed, border patrol agents on roving patrol may not stop a vehicle solely on the basis of the occupant's apparently Mexican ancestry. "Race or color alone is not a sufficient basis for making an investigatory stop." Thus, the fact that Guzman's primary language was Spanish or that he spoke with an accent is insufficient to justify an investigative stop.
>
> The State argues that [the border patrol agents] also knew that Washington rarely issues alien firearm licenses and Guzman was carrying a gun. But while this may be true, it is simply not enough to suspect someone of criminal activity. Guzman was carrying a gun at a gun show. Certainly, a gun show is one of the least suspicious places to tote a gun. More persuasive is the argument that the gun was under his jacket and had not been disabled at the entrance. However, we find that more indications of suspicious activity are required. Neither the record nor the trial court's findings point to any other arguably suspect behavior by Guzman.
>
> What we are left with is a man who failed to check his gun at the gun show entrance, approached a gun dealer's table, and then took out the gun to show the gun dealer the replacement part he needed. These facts alone, without anything more, are insufficient to provide a basis for reasonable suspicion of criminal activity. See State v. Armenta, 134 Wn.2d 1 (1997) [**March 98 LED:12**] (defendants' possession of large amounts of cash was an "innocuous fact" insufficient to justify their seizure); State v. Tijerina, 61 Wn. App. 626 (1991) [**Oct 91 LED:12**] (presence of motel-sized bars of soap in a vehicle driven by Hispanics, combined with officer's knowledge of drug activity by Hispanics in motels, were "innocuous" facts insufficient to justify investigative stop); United States v. Brignoni-Ponce, [422 U.S. 873 (1975)] (apparent Mexican ancestry alone is insufficient to

> justify stopping a car to question the occupant's immigration status, as large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry); Nicacio v. INS, 797 F.2d 700 (9th Cir. 1986) (people of Hispanic-looking appearance, dressed in work clothes and traveling early in the morning are factors insufficient to provide a rational basis for stopping vehicles to search for illegal aliens).

[Officer names, footnotes and some citations omitted]

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## BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

**(1) LOCKSMITH SERVICE LOSES CHALLENGE TO POLICE PRACTICE OF OPENING LOCKED VEHICLE DOORS IN NON-EMERGENCY SITUATIONS** – In Hudson v. City of Wenatchee, ___ Wn. App. ___ (Div. III, 1999) [974 P.2d 342], the Court of Appeals upholds a trial court grant of summary judgment against a locksmith service which sued the City of Wenatchee.

The locksmith service challenged a longstanding practice (referred to by the court as an "informal and unwritten policy") of the Wenatchee Police Department to allow its officers to open locked vehicle doors in non-emergency situations. The locksmith service unsuccessfully claimed that the practice violated: a) state constitutional bars to gifts of public funds; b) federal constitutional due process guarantees protecting property interests; and c) common law protections of business expectancies.

While the Court of Appeals found no factual or legal support for the lawsuit by the locksmith service, the Court appears to have left a little room for a similar lawsuit under different facts.

Result: Affirmance of Chelan County Superior Court grant of summary judgment against Harley G. Hudson and Samantha Hudson, d/b/a/ Harley's Lock and Key.

**(2) "FELONY ELUDING" STATUTE DOES NOT APPLY WHERE PURSUING POLICE VEHICLE NOT MARKED ON SIDES WITH IDENTIFYING LETTERING OR LOGO** – In State v. Ritts, ___ Wn. App. ___ (Div. III, 1999) [973 P.2d 493], Division Three of the Court of Appeals rules that the trial court correctly dismissed charges under the "felony eluding" statute, RCW 46.61.024, where the pursuing police vehicle was "unmarked."

In Ritts, the pursuit began when a deputy sheriff in an unmarked green Ford Bronco was asked by another deputy to stop a car which was leaving a crime scene. When the deputy in the unmarked car activated his flashers and siren, the driver of the suspect vehicle accelerated to 95 m.p.h. and drove recklessly in an attempt to get away before ditching the car in a field.

The prosecutor charged the driver with felony eluding under RCW 46.61.024, but the trial court dismissed the charges under that statute on grounds that the police vehicle was not appropriately marked. RCW 46.61.024 makes it a Class C felony to willfully fail to immediately stop and to drive recklessly after receiving a visual or audible signal to stop from a uniformed police officer whose vehicle is "appropriately marked showing it to be an office police vehicle." RCW 46.61.024. The Court of Appeals explains as follows its conclusion that the trial court was correct in dismissing the charge:

> The eluding statute expressly requires that the signal to stop come from a uniformed officer whose vehicle is appropriately marked showing it to be an official police vehicle. RCW 46.61.024. Appropriate marking is described in RCW 46.08.065 as identifying lettering or logo. The undercover exemption of RCW 46.08.065(1) waives the administrative marking requirement to permit the sheriff's department to operate unmarked cars for investigations. However, the criminal statute cannot be read to

waive the requirement that the police vehicle be marked.

The plain language of RCW 46.61.024 expressly requires both a signal and a marked car. It does not require one or the other. If either the presence of signaling equipment or the nature of the signal itself renders a police vehicle appropriately marked, the language requiring appropriate identifying marking is superfluous. The statutory language includes no exception for unmarked undercover vehicles, with or without flashing lights.

In [State v. Trowbridge, 49 Wn. App. 360 (Div. I, 1987) **March 98 LED:17**] relied on by the State, the statute was held satisfied when an unmarked vehicle actually gave chase after the signal to stop had been given by a uniformed officer whose vehicle was marked with the letters and stripes of an official police vehicle.

That did not happen here. Although the Bronco's emergency lights, including a blue light, were flashing, the statute requires a signal to stop by a uniformed officer whose vehicle is marked.

Mr. Ritts' admission that he knew his pursuer was a law enforcement officer does not relieve the State of proving the elements of the eluding statute. State v. Hudson, 85 Wn. App. 401, (1997) **[Sept 97 LED:19]**. In Hudson, the police car was clearly marked, but the court reversed a felony eluding conviction because there was no evidence that the officers were in uniform. Even though the officers' clothing would not have been discernible at the point when the defendant fled, all the elements of the statute were still required to be proved.

That is the case here. The undercover vehicle pursuing Mr. Ritts was not appropriately marked as a police vehicle. Therefore, the State failed to prove the elements of RCW 46.61.024. This may not be the result the Legislature intended by this statute, but it is nonetheless the result required by the present wording of the statute. We are constrained to therefore affirm the order of dismissal.

Result: Affirmance of Whitman County Superior Court's dismissal of "felony eluding" charge against Mark Snowden Ritts.

**LED EDITOR'S NOTE: There was no question in the Ritts case that the officer had "reasonable suspicion" to support the officer's initial activation of the flashers, and hence that the chase was lawful, even though the elements of the crime could not be established. However, we will use the Ritts case as an excuse to remind our LED readers of State v. Duffy, 86 Wn. App. 334 (Div. III, 1997) Sept 97 LED:20. Duffy held that even if the pursuit is initiated without sufficient cause, a person who commits "felony eluding" in response to the officer's attempt to make a seizure is not permitted to challenge the initial seizure. Felony flight is an unreasonable response to an attempted seizure, Duffy held; therefore, the Exclusionary Rule does not permit a defendant in the Duffy circumstance to question the basis for the original seizure.**

**LED EDITOR'S COMMENT: We understand that a proposal legislative amendment to plug the Ritts loophole is in the works for the 2000 legislative session. It seems eminently reasonable to require citizens to stop for obvious police pursuit vehicles even though the vehicles do not have lettering or a logo on their doors.**

**(3) 14-YEAR-OLD'S LACK OF DRIVER'S LICENSE INSUFFICIENT, ALONE, TO SUPPORT CHARGE UNDER "DISREGARD FOR SAFETY" VARIATION OF VEHICULAR HOMICIDE STATUTE** – In State v. Lopez, 93 Wn. App. 619 (Div. III, 1999), the Court of Appeals for Division Three rules 2-1 that the evidence was insufficient to support a vehicular homicide charge against a 14-year-old who wrecked a car, killing one of her passengers and injuring two others.

The only evidence of improper conduct by the 14-year-old was that she drove the car without a driver's license. The vehicular homicide statute, RCW 46.61.520, makes it vehicular homicide to cause a death of another person by the driving of a vehicle under one of three alternative circumstances: a) while DUI, b) in a reckless manner, or c) with disregard for the safety of others. Ms. Lopez was not DUI nor driving recklessly. So the question in Lopez was whether the lack of a license or driver's training was evidence of disregard for the safety of others for purposes of RCW 46.61.520. The majority judges in Lopez (Judges Schultheis and Kurtz) explain as follows their view that the evidence was insufficient to support the vehicular homicide charge:

> While Ms. Lopez's failure to acquire a license or driver's training constitutes more than a minor inadvertence or oversight, this failure -- without more – is insufficient to show disregard for the safety of others. The State presented no evidence that Ms. Lopez actually was an inexperienced driver or that she participated in speeding, horseplay or driving under the influence of intoxicants. It is not enough to show that an unlicensed minor without formal driver's education is likely to endanger persons or property by driving. Some evidence of the defendant's conscious disregard of that danger is necessary to support vehicular homicide. In short, a minor's status as an unlicensed driver is not enough to establish beyond reasonable doubt a disregard for the safety of others.

Judge Brown dissents, arguing that the evidence as a whole was sufficient to submit the "disregard for safety" question to the jury.

Result: Affirmance of Yakima County Superior Court dismissal of vehicular homicide charge against Nina L. Lopez.

Status: The prosecutor has filed a petition for review in the State Supreme Court.

**(4) KNOWINGLY PAYING A DEBT WITH AN NSF CHECK WITH INTENT TO GET A BRIEF REPRIEVE FROM CREDITOR'S COLLECTION EFFORTS CONSTITUTES "UNLAWFUL ISSUANCE OF A BANK CHECK"** -- In State v. Alams, 93 Wn. App. 754 (Div. I, 1999), the Court of Appeals rejects defendant's argument that he could not be convicted of "unlawful issuance of a bank check" where he knowingly issued NSF checks with the "mere" intent to get a brief reprieve from a creditor's persistent collection efforts.

The Court of Appeals addresses Alams' argument as follows:

> The offense of unlawful issuance of a bank check includes as an element of the offense the "intent to defraud." Alams contends that the evidence is insufficient to prove this element because he gave Padovan a check in payment of a pre-existing, past due debt.
>
> Alams argues that the intent to defraud element is not met because "the recipient loses nothing, since he or she is still entitled to the money and the identical remedies remain available for nonpayment." In State v. Bradley, 190 Wash. 538 (1937) Bradley likewise argued that there was insufficient evidence of an intent to defraud because payment of a past due debt with a worthless check does not extinguish the recipient's rights. The Court disagreed, holding that Rem.Rev.Stat. § 2601-2, which for all practical purposes is identical to RCW 9A.56.060, "may be violated by the giving of a worthless check in purported payment of a past due indebtedness." The Court specifically declined to follow contrary case law established in other jurisdictions.
>
> Alams' only attempt to distinguish this case is an argument that neither he nor Padovan could have felt a sense of insecurity because both knew that Padovan

> would immediately present the check to the bank for payment. We do not find this argument convincing. Viewing the evidence in a light most favorable to the State, the jury could have found that Alams sought a brief reprieve from Padovan's collection efforts. The extent of the reprieve, i.e., the success or failure of the criminal intent, is immaterial. Finding no reasonable distinction between the issue before the Bradley court and the issue before this court, we find the evidence sufficient to support the verdict.

[Some citations omitted]

Result: Affirmance of Snohomish County Superior Court conviction of Humphrey Akunodi Alams for "unlawful issuance of a bank check."

**(5) CONSENT PORTION OF MUTUAL AID AGREEMENT WAS VALID UNDER "MUTUAL AID PEACE OFFICER POWERS ACT" EVEN THOUGH REMAINDER OF AGREEMENT WAS NOT VALID** – In State v. Plaggemeier, 93 Wn. App. 472 (Div. II, 1999), the Court of Appeals rules that a City of Poulsbo police officer had authority to make a traffic stop and arrest outside the city limits, even though the officer's extraterritorial arrest authority derived from a Mutual Aid Agreement which was for the most part invalid.

The officer was acting under a Mutual Aid Agreement among five local jurisdictions, one of which was the City of Poulsbo. Among its other provisions, the agreement included cross "consents" to arrest authority by the respective chief law enforcement officers of the five jurisdictions on the agreement. Each chief law enforcement officer had signed the agreement.

The Court of Appeals explains that two requirements for interlocal agreements under chapter 39.34 RCW were not met on this agreement: the agreement had not been approved or ratified by each jurisdiction's legislative body and the agreement had not been filed with the county auditor. However, the Court of Appeals holds that the consents in the agreement can be severed from the agreement. Thus, the Poulsbo officer had authority to act outside the City of Poulsbo under RCW 10.93.070(1) of the Washington Mutual Aid Peace Officer Powers Act of 1985. That subsection provides:

> In addition to any other powers vested by law, a general authority Washington peace officer who possesses a certificate of basic law enforcement training or a certificate of equivalency or has been exempted from the requirement therefore by the Washington state criminal justice training commission may enforce the traffic or criminal laws of this state throughout the territorial bounds of this state, under the following enumerated circumstances:
>
> 1) Upon the prior written consent of the sheriff or chief of police in whose primary territorial jurisdiction the exercise of the powers occurs:
> 2) ...

Result: Reversal of dismissal orders by Kitsap County District Court and Superior Court; case remanded to District Court for DUI trial of Thomas l. Plaggemeier.

**LED EDITOR'S NOTE: In ruling that the remainder of the Mutual Aid Agreement was invalid, the Court of Appeals explains that a Mutual Aid Agreement agreed to under chapter 10.93 RCW must also meet the requirements of the Interlocal Cooperation Act at chapter 39.34 RCW. Under chapter 39.34, an agreement among local governmental entities must be: 1) ratified by the respective city and county councils, and 2) filed with the county auditor. The prosecutor's argument in Plaggemeier was that the Mutual Aid Peace Officer Powers Act, chapter 10.93 RCW, relieves law enforcement agencies from the council-approval and filing**

**requirements of chapter 39.34 RCW. The Plaggemeier Court rejects this argument. All Washington agencies, state and local, should check with their respective legal advisors to ensure that all elements of any existing mutual aid agreements are valid under the Interlocal Cooperation Act.**

**(6) DUI DEFENDANT WAIVED CORPUS DELICTI CHALLENGE UNDER HAMRICK/CORBETT RULE BY TESTIFYING AT DUI TRIAL ABOUT HER DRIVING** – In State v. Liles-Heide, ___ Wn. App. ___ (Div. I, 1999) [970 P.2d 349] the Court of Appeals rules that, when a DUI defendant took the witness stand at her trial and testified to driving, she waived her corpus delicti challenge to the admission of her earlier confession to an officer.

Under Washington DUI corpus delicti case law, a DUI suspect's admission to a police officer that he or she was driving the vehicle will not support a DUI conviction unless the prosecution puts on evidence corroborating the confession. Here, Ms. Liles-Heide had been standing some distance from a car that was partly in a ditch when an officer arrived at the scene. She confessed to the officer that she had driven the car into the ditch while trying to clear space among cars of people attending a party. The officer arrested her for DUI when she failed sobriety tests.

Prior to her DUI trial, she moved to dismiss on grounds that the state could not corroborate her confession that she had been driving the car. The government's only corroborating evidence was that she was quite short and the driver's seat on the car was pushed up close to the steering wheel. The district court judge dismissed her motion and allowed the case to go to trial. At trial, Ms. Liles-Heide took the witness stand and testified to having driven the vehicle. She was convicted in a jury trial. The Superior Court reversed her conviction based on her corpus delicti argument. However, the Court of Appeals has now reversed, ruling that she waived her corpus delicti challenge by taking the witness stand and admitting that she had been driving.

Result: Reversal of Snohomish County Superior Court decision which reversed a District Court DUI conviction against Cheri Lynn Liles-Heide; conviction reinstated.

**LED EDITOR'S NOTE: The leading cases on establishing "driving" for DUI corpus delicti purposes are Bremerton v. Corbett, 106 Wn.2d 569 (1986) Nov 86 LED:03 and State v. Hamrick, 19 Wn. App. 417 (Div. I, 1978). The corpus delicti issue most often arises in a one-car MVA where no witness saw the suspect driving or getting out of the car. Even if a defendant in this situation admits to the investigating officer or others that he or she was driving, the State must put on evidence consistent with defendant's driving. Examples of such evidence include: a) injuries consistent with MVA; b) vehicle registered to suspect; c) keys to car are on suspect's person; d) personal effects of suspect are in vehicle.**

**(7) DRUG DEALER LOSES "I HAD NO IDEA" CHALLENGE TO SENTENCE ENHANCEMENT FOR SALE WITHIN 1000 FEET OF A SCHOOL BUS STOP WHICH ALSO SERVED AS COUNTY TRANSIT STOP** – In State v. Davis, 93 Wn. App. 648 (Div. II, 1999), the Court of Appeals rejects a drug dealer's argument that he should not have his sentence enhanced for making a deal within 1000 feet of a school bus stop. Robert L. Davis argued that he could not be expected to know of the existence of the particular school bus stop. The Court of Appeals rejects his argument under the following analysis:

> RCW 69.50.435(a) prescribes an enhanced penalty for persons selling drugs within 1000 feet of a school bus stop. RCW 69.50.435(f)(3) defines "school bus stop" as any stop designated by a school district.
>
> The Bremerton School District contracted with Kitsap Transit to supply school transportation on its regular public buses, which do not look like typical yellow school

> buses. The Bremerton School District had designated as a school bus stop, a Kitsap Transit stop that was 588 feet from the residence in which Davis was dealing drugs; the stop's coordinates were provided to the superintendent of public instruction. Davis claims that because there is no fair way to know that this public transit stop is also a school bus stop, his sentence enhancement under RCW 69.50.435 violated due process. We disagree.
>
> The Court, in State v. Coria, 120 Wn.2d 156 (1992), upheld the constitutionality of sentence enhancement under RCW 69.50.435. The location of school bus stops can be learned by "observing the gathering of schoolchildren waiting for their school buses, or contacting local schools or the director of transportation for the school district." Thus, a defendant's knowledge of a school bus stop location is not required; rather, the mere existence of the stop is sufficient to warrant the sentencing enhancement.
>
> As under Coria, it is of no import here that the defendant was unaware of the existence of a school bus stop. And, therefore, it is irrelevant that Davis did not realize that: (1) the nearby public bus stop was also a designated school bus stop; (2) a public bus was used to transport school children; or that the bus was not standard school bus yellow. Because anyone could discover the stop's location using an objective method, such as observing school children or contacting the school district's Director of Transportation, Davis' due process challenge fails.

In a footnote, the Davis Court distinguishes recent decisions involving the sentence enhancement for a “school zone” penalty enhancement in relation to a GED program in a downtown Seattle office building:

> Davis relies on State v. Becker, in which a GED program was located on the third floor of a commercial office building. State v. Becker, 132 Wn.2d 54 (1997). The Becker Court distinguishes Coria: Unlike Coria, where there was an objective method for locating school bus stops, in Becker there was no objective method to determine that a GED program was located in the commercial building; moreover, the court ruled that the program was not a “school” within the meaning of the statute enhancing penalties for drug sales near schools. Recently, in State v. Akers, 136 Wn.2d 641 (1998), the Supreme Court upheld Division One’s invalidation of a school zone penalty enhancement where there was no readily ascertainable means to discover that a drug transaction took place within 1000 feet of a school, the Youth Education Program (YEP), located inside a downtown Seattle office building. Relying on State v. Becker also concerning YEP, Division One had ruled that whether the YEP program was a “School” was a factual question for the jury.
>
> But here, the existence of a school bus stop was not a factual question for the jury because the school bus stop could be readily ascertained by observing the gathering of school children or by calling the school district. As such, Akers is distinguishable from the instant case, just as Coria is distinguishable from Becker.

Result: Affirmance of Kitsap County Superior Court convictions of Robert L. Davis for delivery of cocaine, possession of methamphetamine, and unlawful possession of a firearm; case remanded for revision of sentencing on an issue not addressed in LED.

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## NEXT MONTH

Much of the July 99 LED will be devoted to Part One of our 1999 Washington Legislative Update. Most bills passed in 1999 will become effective on Saturday, July 24, 1999 (90 days after the end of the regular session).

In addition, we plan to include in the July 99 LED our long-promised article summarizing our personal views on the question of whether custodial arrest is lawful for "minor offenders" who are unable to reasonably identify themselves to investigating officers. We have completed a draft of an article on this subject, but, but becoming increasingly aware as we worked on the article that the statutes and case law have many gaps, and further recognizing the sensitive nature of the subject matter, we have decided to first circulate our draft article to select attorneys and police trainers for critique before putting a final version in the LED.

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